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Supreme Court, U.S.
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No. 88-1168

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD C. SWAIN and
EDWARD H. HAMMOND — PETITIONERS

v.

KENNETH A. LINDSEY — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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KENNETH A. LINDSEY

February 8, 1989

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QUESTIONS PRESENTED

1. Whether the Court of Appeals of Kentucky clearly erred in dismissing Petitioner's appeal from an interlocutory order;

2. Whether the question presented by Petitioner is moot.

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STATEMENT OF THE CASE

Respondent Lindsey filed a deprivation of civil liberties action pursuant to 42 U.S.C. §1983 et seq. At the trial court level, Petitioners made an initial Motion for Summary Judgment Judgment [on grounds not related to the within issues]. The trial court overruled the first motion for summary judgment and

no appeal was thereafter perfected. The Respondent was deposed and both Petitioners were deposed. Additionally, Respondent's immediate supervisor was deposed as well. Thereafter, Petitioners filed a second motion for summary judgment arguing, in relevant part, that the doctrines of sovereign or qualified immunity entitled them to judgment as a matter of law. The second motion for summary judgment was also overruled.

The Petitioners perfected an appeal to the Court of Appeals of Kentucky from the interlocutory order denying their second motion for summary judgment. Respondent, by counsel, filed a motion to dismiss the appeal arguing that the order from which the appeal was taken was not final and appealable. The Kentucky Court of Appeals sustained the motion and

dismissed the appeal. Petitioners thereafter filed a motion to reconsider. The Kentucky Court of Appeals denied the motion to reconsider. Petitioners thereafter filed a motion for discretionary review with the Supreme Court of Kentucky. The Supreme Court of Kentucky denied the motion.

The Petitioners next filed a motion for stay in the Kentucky Court of Appeals. The Court of Appeals denied the motion and the Petitioners thereafter perfected yet another motion for discretionary review with the Supreme Court of Kentucky. The Supreme Court of Kentucky denied the motion.

REASONS FOR DENYING THE WRIT

The trial of this action is to commence on February 8, 1989. Respondent's Brief in Opposition is

therefore due after the commencement of the trial and, in all likelihood, after the conclusion of the trial. Therefore, the matter for which review is sought is moot.

The Petitioners permitted discovery to proceed before arguing that the doctrines of sovereign or qualified immunity protected them from these proceedings. Although the doctrines were set forth in the Petitioners' answer to Respondent's Complaint, the Petitioners nevertheless permitted discovery to continue without objection. Therefore, it would appear that the Petitioners have waived their claim to now object.

It is axiomatic under Kentucky law that an order overruling a motion for summary judgment is not final and appealable. Such an order is interlocutory.

> An order overruling a motion for summary judgment is an interlocutory order. Since it is not a final order it is not appealable. Battoe v. Beyer, Ky., 285 S.W.2d 172, 173 (1955) [citations omitted].

Accord, Bell v. Harmon, Ky., 284 S.W.2d 812, 814 (1955); Gumm v. Combs, Ky., 302 S.W.2d 616, 617 (1957).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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